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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED
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 RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND

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8 DELANO TOLDEN,

9 Petitioner,

10 v.

11 JAMES E. TILTON, Director,
 12 Department of Corrections,

13 Respondent.

D.C. No. CO8-03782**PETITION FOR WRIT
 OF HABEAS CORPUS**

14 Petitioner, Delano Tolden, through his counsel Victoria H. Stafford, files this Petition for
 15 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 et seq. Petitioner alleges as follows:

16 1. The name and location of the court which entered the judgment of conviction and
 17 sentence under attack herein is the Superior Court of the County of Santa Clara, State of
 18 California, case number CC467314.

19 2. Petitioner is confined at the California State Prison in Solano, California under a
 20 sentence of life imprisonment pursuant to the judgment of the Santa Clara County Superior
 21 Court, case number CC467314.

22 3. The date of the entry of the judgment and sentence in case number CC467314 was
 23 April 21, 2005.

24 4. Petitioner was charged by Information filed on October 14, 2004, and by an Amended
 25 Information filed on December 10, 2004, in count one with failing to register as a sex offender in
 26 Sunnyvale and in count two with failing to notify the Modesto police of his new address. Penal
 27 Code § 290(g)(2). Thirteen prior strike convictions and two prior prison terms were alleged.

1 Penal Code §§ 667.5(b),1170.12.

2 5. On December 1, 2004, jury trial before the Honorable Rise Jones Pinchon started.

3 6. On December 13, 2004, the jury reached a guilty verdict in count 1 and a not guilty
4 verdict in count 2.

5 7. On December 14, 2004, petitioner having waived a jury trial on the priors, the court
6 found all the allegations to be true.

7 8. On April 21, 2005, the court denied petitioner's motion to strike his prior strike
8 convictions, but struck the two prior prison term allegations. It then sentenced him to a term of
9 25 years to life under the Three Strikes law.

10 9. Petitioner timely appealed his conviction to the California Court of Appeal for the
11 Sixth Appellate District under case number H028839. The appeal raised the following issues:

12 A. The court committed prejudicial error in failing to exclude appellant's
13 statement to officer Olson due to the prosecution's failure to prove a voluntary and intelligent
14 waiver of *Miranda* rights;

15 B. Admission of highly prejudicial testimony regarding appellant's failure to
16 comply with parole regulations violated appellant's right to due process and a fair trial as well as
17 Evidence Code sections 1101, subdivision (a) and 352;

18 C. The court committed prejudicial constitutional error in instructing the jury in
19 CALJIC 1.20 and CALJIC 3.30 that it need not find that appellant intended to violate the law or
20 that he knew his conduct was unlawful;

21 D. Misinstruction on the actual knowledge element of the offense was prejudicial
22 error;

23 E. The court committed prejudicial error in giving CALJIC 2.01, the general
24 circumstantial evidence instruction, instead of CALJIC 2.02 which pertains to circumstantial
25 evidence of mental state;

26 F. The court erred in failing to instruct in mistake of law;

27 G. Imposition of a life sentence on a mentally retarded defendant for failing

1 register as a sex offender and for remote strike convictions is cruel and unusual punishment
2 under the state and federal constitutions;

3 H. Imposition of greater restitution fines following retrial violated double
4 jeopardy and due process provisions of the state constitution;

5 I. The Penal Code section 290.3 fine must be stricken.

6 J. Imposition of a court security fee violated prohibitions against retroactive and
7 ex post facto application of statute.

8 10. On July 13, 2005, in case number H028839, the Court of Appeal for the State of
9 California, Sixth Appellate District, issued an opinion affirming petitioner's convictions but
10 reducing the fines imposed.

11 11. On April 20, 2007, the Court of Appeal denied petitioner's petition for rehearing.

12 12. On May 7, 2007, petitioner filed a petition for review in the California Supreme Court
13 in case number H028839, California Supreme Court case number S152501. The petition for
14 review raised the following issues:

15 A. Review must be granted to decide whether imposition of a life sentence on a
16 mentally retarded defendant for failing register as a sex offender and for remote strike
17 convictions is cruel and unusual punishment under the state and federal constitutions;

18 B. Review should be granted to decide whether it is error to instruct a jury that to
19 convict a defendant of failing to register, it must find he had actual knowledge of his duty to
20 register but it need not find he intended to violate the law or knew his conduct was unlawful;

21 C.. Review should be granted to decide whether it is error not to require proof that
22 the defendant knew of the specific registration provision with which he failed to comply;

23 D. Review should be granted to decide whether a *Miranda* waiver may be implied
24 where there is a break in the interrogation of unknown length and content between the
25 advisement and the resumption of the interrogation.

13. On June 20, 2007, the California Supreme Court denied the petitioner's petition for
review in case number S152501. On June 22, 2007, remittitur issued.

1 14. The instant case was a retrial following a reversal on appeal in Santa Clara County
2 case number 204709. In that case, an information filed on April 27, 1998 charged petitioner with
3 failing to register as a sex offender and failing to notify the Modesto police department of his
4 new address, Penal Code § 290(g)(2), and alleged 17 prior strike convictions and two prior prison
5 terms. Following a court trial, on October 18, 1999, the trial court found him guilty on both
6 counts and petitioner admitted the prior conviction allegations. On February 8, 2002, the court
7 imposed concurrent terms of 25 years to life, dismissed one strike allegation on the prosecution's
8 motion and struck the two prior prison term allegations. In an opinion filed on May 27, 2004, the
9 Court of Appeal, Sixth Appellate District, reversed petitioner's conviction on the ground that the
10 trial court had relied on an erroneous definition of willfulness when it concluded that a violation
11 of section 290 does not require proof that the defendant had actual knowledge of the registration
12 requirement. The court found the error prejudicial because petitioner had presented "significant
13 evidence" to refute the allegation of willfulness consisting of evidence that he is mentally
14 retarded and has limited mental functioning.

15 15. The grounds on which petitioner alleges he is confined unlawfully in violation of the
16 Constitution and law of the United States are as follows:

17 **Claim No. 1: IMPOSITION OF A LIFE SENTENCE ON**
18 **A MENTALLY RETARDED DEFENDANT WITH**
19 **SERIOUS IMPAIRMENT OF MENTAL FUNCTIONING**
20 **FOR FAILING REGISTER AS A SEX OFFENDER AND**
21 **FOR VERY REMOTE STRIKE CONVICTIONS IS CRUEL**
22 **AND UNUSUAL PUNISHMENT UNDER THE EIGHTH**
23 **AMENDMENT TO THE UNITED STATES CONSTITUTION.**

24 16. Petitioner's sentence violates the Eighth Amendment's prohibition against cruel and
25 unusual punishment because the undisputed evidence at trial showed that he is mentally retarded
26 and would not have been capable of complying with sex registration requirements without
27 assistance. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Ewing v. California*, 538 U.S. 11, 23
(2003). The following facts support this claim:

28 17. Petitioner was convicted of failing to register as a sex offender in violation of Penal
29 Code section 290(g) and received a sentence of 25 years to life sentence under the Three Strikes

1 law.

2 18. Petitioner was arrested on November 16, 1997 in Sunnyvale, California for failing to
3 comply with sex registration requirements by failing to register in Sunnyvale and failing to notify
4 Modesto authorities that he had moved. It was determined that he had last registered in Modesto
5 in 1994. Upon his arrest, he gave his name as Donald Tolden and his birth date as September 8,
6 1959.

7 19. When officer Lee interviewed petitioner at the station, petitioner gave his date of birth
8 as July 9, 1954. Petitioner recounted how he moved to Hayward in November 1994, then moved
9 around the Bay Area, and finally moved to San Jose in June or July of 1997. He stated he had
10 not registered since registering in Modesto in 1994. Lee found numerous dates of birth and
11 variations on petitioner's name listed in Violent Crime Information Network and California
12 Department of Justice databases.

13 20. The day after his arrest, petitioner was interviewed by officer Olson. He admitted he
14 had been living at 174 Carol Street in Sunnyvale for 18 months. He asked Olson to contact the
15 manager Marilyn and gave him a phone number which turned out to be off by a few digits. He
16 told Olson that starting in 1996, he had been working as a baggage handler at Greyhound. He
17 said he was afraid to go back to Modesto, and he described how he knew something about a
18 friend's murder and that his life, the life of his parole officer, and a police officer's life had been
19 threatened because someone suspected petitioner was a snitch.

20 21. Olson asked petitioner why he did not go to the Sunnyvale Department of Public
21 Safety and register since he was living in Sunnyvale. Petitioner responded: "I didn't know
22 anything about that.... So there's a lot of things I'm just now learning about, you know.... I didn't
23 know that." When Olson asked whether he was saying he did not know he had to register,
24 petitioner stated: "I figured, I figured since I was already registered, you know, I didn't know at
25 that time, that I didn't know nothing about that at the time, you know.... I figured then, that was
26 that, you know." When Olson asked him whether he had to register as a narcotics offender,
27 petitioner responded, "No, I just, it was just one time, you know." After Olson described the sex
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1 registration requirements, including that the requirement used to be to register within 14 days,
2 but now it was five, petitioner told him he wanted to "get this stuff out of the way," that there
3 would be no problem with him registering, and that the requirement used to be 15 days, but
4 nowadays it was five.

5 22. Olson testified that during the interview, petitioner was somewhat incoherent,
6 unresponsive, and rambling. Petitioner gave Olson the impression he was trying to convince him
7 he had been doing a good job and not getting into trouble, and that he was eager to please.
8 Petitioner told him he had been working hard and always paid his rent on time. During the
9 interview petitioner was very emotional and was sobbing.

10 23. Clinical forensic psychologist Dr. Timothy Derning testified that he evaluated
11 petitioner twice, in 1999 and in 2004. On both occasions, Derning concluded that petitioner had
12 significant cognitive limitations. He measured petitioner's verbal IQ as 73, and his performance
13 IQ as 65, giving him a full scale IQ score of 67. This placed him in the bottom first percentile of
14 the population, which he stated is extremely low. Derning's results were consistent with the
15 results of an IQ test administered previously in prison and with two prison classification
16 documents in which his reading level was assessed as at second grade, or below fourth grade,
17 based on his TABE test scores.

18 24. Derning administered an executive functions skills test, the Deles Kaplan Executive
19 Function System or DKEFS, which tests higher order cognitive processes based on memory,
20 concentration, and cognitive skills, including ability to plan, respond, and organize. Petitioner
21 scored 3 in a scale in which 10 was average, was slow to complete the test, made mistakes, and
22 had difficulty staying on task. His reading ability was poor. His inability to finish the visual
23 scanning test led Derning to conclude he had a significant impairment in the flexibility of his
24 cognitive reasoning. On the motor speed test, he performed in the low average range, which
25 indicated his deficits were cognitive rather than related to motor ability. On the verbal fluency
26 test, petitioner scored 4 out of 18. Derning could not score the last part of the test because
27 petitioner could not complete the test. His overall performance suggested he has an impairment

1 and difficulty following directions, staying on task, and thinking quickly. (6 RT 560.)

2 25. Derning testified that petitioner did poorly on the Wisconsin Card Sort test, which
3 also tested executive function. He was not able to match cards by color, and would make
4 mistakes sorting by shape, even though he was genuinely trying. Derning discontinued the test
5 because there was no point in torturing him with it.

6 26. Derning gave petitioner the KFAS, or Kaufmann Functional Academic Skills test,
7 which measures adaptive ability and academic skills and asks people to do real world problem
8 solving tasks. His composite score put him in the second percentile.

9 27. A cognitive competency test administered in 1999 also measured petitioner's ability
10 to do real world tasks. Derning read petitioner an appointment and its date, time, and location,
11 e.g., a dentist appointment on Wednesday at 3:30 at the central clinic, and immediately asked
12 him to repeat it. Petitioner got only half of it right. Derning repeated the information, and asked
13 him to repeat it 20 minutes later, at which time petitioner remembered only three out of the four
14 elements. When Derning gave petitioner a mixture of financial documents and asked him to
15 select which ones to deposit, petitioner included bills and receipts with the cash and checks. On
16 an employment form Derning asked him to fill in, petitioner put his full name in the box for the
17 last name, and gave a date of birth of November 9, 1953.

18 28. Derning determined that petitioner had significant memory issues based on the
19 memory skills subtest. When Derning administered the Wechsler Memory Scale, petitioner was
20 unable to do even the basic tasks. In Derning's opinion, petitioner would have difficulty with
21 long-term event planning, and would need a tool, such as a calendar, to remind him. Petitioner
22 was not good with dates, including his own date of birth and the present date.

23 29. Derning believed that the language on the notification form, like "I must register
24 within 14 days of coming to any city, county or city and county in which I am domiciled with the
25 law enforcement agency having jurisdiction over my place of residence," did not fall within
26 second and third grade reading level and was clearly over petitioner's head.

27 30. Petitioner's manager at the Greyhound station, Geraldine Fegley described

1 petitioner's job duties. He put destination tags on passengers' luggage, unloaded luggage, and
2 matched the tags to the passengers' claim checks. He filled out tally cards which required him
3 to note for each bus the schedule, the bus number, the final destination, and the number of bags
4 and express packages. In addition, petitioner had janitorial duties which entailed cleaning the
5 buses. Fegley asked petitioner not to handle bus bills after she determined that he consistently
6 failed to fill in the required information or filled it in incorrectly, with the result that the baggage
7 would not get to the passenger.

8 31. Fegley stated that petitioner received scores between 3.0 and 3.5 on a scale of 0 to 5, 5
9 being the highest, on his performance evaluations. As a new employee, petitioner was teamed
10 with an old employee. His starting pay was \$5.90, which was then increased to \$6.60 per hour.
11 His check was sent to the Greyhound station where he would pick it up. Greyhound conducted a
12 pre-employment employee investigation of petitioner.

13 32. Although Fegley testified that petitioner had excellent oral and written
14 communication and basic math skills, she acknowledged the numerous spelling and usage errors
15 on his job application, such as "Janitor experience, wax, fool, clean, take wax off. Clean
16 restrooms, stock person, clean win, fix door," were not indicative of excellent communication
17 skills. She agreed that most of petitioner's work was manual and did not involve a lot of
18 cognitive thinking ability, and that two baggage handlers were scheduled to work each shift, only
19 one of which would do the tally sheets, which were then checked by the bus drivers. She further
20 acknowledged that petitioner would not have been promoted from baggage handler based on his
21 inability to fill in bus bills. Fegley testified that petitioner was a hard worker and eager to please.

22 33. Marilyn Beswick, the property manager of petitioner's Carol Street apartment,
23 testified that petitioner moved into one of the affordable studios in November of 1996. She
24 stated she had no problem communicating with him, but acknowledged she only saw him
25 occasionally and their communication consisted of a passing "hello." On the application he
26 listed his name as Delano Don Tolden, and put his last name in the box for the first name, and
27 the name Don in the line above. He misspelled baggage, and in the space for adding information

1 that might be helpful, petitioner wrote: "I have not had any evaluating last past 19 year since been
2 heard in California. None." He gave a date of birth of July 19, 1952.

3 34. Santa Clara County Jail correctional officer Martin Strosnider testified that he
4 interacted with petitioner in 2001 when petitioner was a temporary trustee. Petitioner cleaned
5 and assisted in distributing lunches and dinners. Though he followed instructions, answered
6 questions appropriately, and communicated in a way Strosnider could understand, he was "a little
7 slow," and he was always assisted by another inmate. He described petitioner as eager to please.

8 35. It was stipulated at trial that petitioner's actual date of birth was July 9, 1959.

9 36. Petitioner had not suffered any felony convictions since his 16 convictions for sex
10 offenses in 1981, a quarter century before trial. Those offenses arose from a single episode of
11 sexually violent behavior when petitioner was 21. He used a pellet gun to force four teenagers to
12 a remote area where he made the girls engage in sex acts over the course of an hour and a half.
13 After his release in 1991, he was convicted only of two misdemeanors, falsely identifying
14 himself to an officer in 1991 and possessing paraphernalia, and his parole was violated eight
15 times.

16 37. The Eighth Amendment to the United States Constitution, which prohibits the
17 infliction of "cruel and unusual punishments" forbids extreme sentences that are "grossly
18 disproportionate" to the crime. *Ewing v. California*, 538 U.S. 11, 23 (2003). To determine
19 proportionality, the court considers: 1) the gravity of the offense and the harshness of the penalty;
20 2) the sentences imposed on other criminals in the same jurisdiction; and 3) the sentences
21 imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277,
22 290 (1983). The Eighth Amendment "draw[s] its meaning from the evolving standards of
23 decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, __ U.S. __, 128 S.
24 Ct. 2641, 2649 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)).

25 38. The deficiencies of the mentally retarded "do not warrant an exemption from criminal
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27

1 sanctions, but they do diminish their personal culpability." *Atkins v. Virginia*, 536 U.S. 304, 318
2 (2002). The mentally retarded have "diminished capacities to understand and process
3 information, to communicate, to abstract from mistakes and learn from experience, to engage in
4 logical reasoning, to control impulses, and to understand the reactions of others." *Id.* Exempting
5 the mentally retarded from the death penalty reflects "evolving standards of decency." *Id.* at 321.

6 39. A 25-year-to-life sentence for a technical violation of Penal Code section 290
7 committed by a man with no mental defect is cruel and unusual under the United States
8 Constitution where the defendant did not intend to evade law enforcement and his prior
9 convictions sustained 16 years earlier were remote. *People v. Carmony*, 127 Cal.App.4th 1066,
10 1072 (2005) The sentence imposed was longer than required for second-degree murder in
11 California, and California is the only state that requires a life sentence with a mandatory prison
12 term of 25 years prior to parole eligibility for a three-strikes offender whose violation is
13 noncompliance with the annual registration requirement. *Id.* at 1084.

14 40. In petitioner's case, Dr. Derning's uncontested testimony showed that petitioner is
15 mentally retarded, that he falls within the bottom first percentile of the population in cognitive
16 functioning and the bottom second percentile in life skills, and that he suffers memory
17 impairments that are so serious that he cannot recall his full name, or his date or place of birth.
18 The same expert's testimony showed that petitioner would have been incapable of understanding,
19 remembering, and complying with sex registration requirements unless he received assistance.

20 41. The evidence showed that petitioner did not intend to evade law enforcement. He
21 was employed with Greyhound, a major national corporation and was receiving wages and
22 paying taxes under his real name. He was living in low income housing under a lease in his own
23 name.

24 42. Petitioner's prior strike convictions were extremely remote as they were sustained 23
25 years before trial and were not followed by any other felony convictions.

43. Petitioner's life sentence for failing to register as a sex offender after moving to a new city is "grossly disproportionate" to the crime and constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution, because the uncontested evidence showed that his limited mental functioning rendered him incapable of understanding, remembering, and complying with sex registration requirements, the evidence showed that he did not intend to evade law enforcement, his prior convictions were extremely remote, his sentence is longer than that imposed for second-degree murder in California, and California is the only state in which life sentences are imposed on persons who fail to comply with sex registration requirements.

Claim No. 2: THE PROSECUTION DID NOT MEET ITS BURDEN OF PROVING THAT PETITIONER MADE A VALID WAIVER OF HIS *MIRANDA* RIGHTS BECAUSE HE DID NOT EXPLICITLY WAIVE HIS RIGHTS AND NO WAIVER CAN BE IMPLIED BECAUSE THERE WAS A BREAK IN THE INTERROGATION OF UNKNOWN LENGTH AND CONTENT BETWEEN THE ADVISEMENT AND THE RESUMPTION OF THE INTERROGATION.

44. Petitioner's Fifth and Sixth Amendment rights were violated when his statement to officer Olson was admitted although the prosecution did not prove that petitioner waived his *Miranda* rights. The following facts support this claim:

45. Petitioner hereby incorporates by reference paragraphs 1 to 43 of this petition.

46. After officer Olson advised petitioner of his constitutional rights and asked him whether he was willing to waive his rights, petitioner asked to speak to Olson off the tape and Olson turned off the recorder. When the recording resumed, Olson started questioning petitioner and petitioner responded to questions. At trial, officer Olson could not recall how long the break in the interview was or what was said in that break, but he was sure he did not make promises because he never does. Petitioner never waived his rights on the record.

47. A waiver of *Miranda* rights is knowing and intelligent if it is "made with a full

1 awareness both of the nature of the right being abandoned and the consequences of the decision
2 to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986) The prosecution “bears the burden
3 of proving, at least by a preponderance of the evidence, the *Miranda* waiver, and the
4 voluntariness of the confession.” *Missouri v. Seibert*, 542 U.S. 600, 609 (2004). Neither the
5 advisements nor the waivers may be presumed from a silent record. *Miranda v. Arizona*, 384
6 U.S. 436, 498-99 (1966); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). A defendant’s
7 silence, coupled with an understanding of his rights and a course of conduct indicating waiver,
8 may support a conclusion that a defendant has waived his rights. *North Carolina v. Butler*, 441
9 U.S. at 373.

10 48. Petitioner’s conduct did not indicate waiver because he neither communicated an
11 intent to waive his rights nor did he immediately answer questions. Instead, when Olson asked
12 him if he was willing to waive his rights, he asked to speak with Olson off the record, conduct
13 which bespoke a reluctance to speak or at least a concern about waiving his rights. In addition,
14 the advisement and the continuation of the interrogation were separated by a gap of unknown
15 duration during which a conversation of unknown content occurred between the officer and the
16 defendant. At best, such a gap is a silence, from which, according to *Miranda*, nothing may be
17 presumed. This evidence precluded a finding of inferred waiver in petitioner’s case.

18 49. The admission of the interrogation was damaging. Petitioner admitted that he moved
19 from Modesto in 1994 and that he had not registered. Although petitioner did not admit that he
20 knowingly failed to register, the prosecutor used his statements out of context to make it appear
21 that he moved to evade detection. Thus, the prosecutor emphasized that petitioner told Olson he
22 did not return to Modesto because they would “smoke” his parole, although it is clear from his
23 consistent use of the term “smoke” in the sense of “kill” during the interview that he meant that
24 he feared his parole officer, a police officer, and he himself would be smoked by the “dudes”
25 involved in a homicide

1 **Claim No. 3: PETITIONER WAS DEPRIVED OF HIS FEDERAL**
 2 **CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR**
 3 **TRIAL WHEN THE COURT INSTRUCTED THE JURY THAT**
 4 **TO CONVICT PETITIONER IT NEED NOT FIND HE INTENDED**
 5 **TO VIOLATE THE LAW OR KNEW HIS CONDUCT WAS UNLAWFUL.**

6 50. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated when the
 7 trial court instructed the jury that a conviction of violating registration requirements does not
 8 require an intent to violate the law. *Lambert v. California*, 355 U.S. 225, 227 (1957) (person
 9 may not be convicted of failing to register as a felon if person did not know of the duty to register
 10 and there was no proof of the probability of such knowledge); *Bartlett v. Alameida*, 366 F.3d
 11 1020, 1023-24 (2004); *People v. Garcia*, 5 Cal.4th 744, 753-754 (2001) (actual knowledge of the
 12 registration requirements is a required element of a registration offense); *Sandstrom v. Montana*
 13 (1979) 442 U.S. 510, 524; *United States v. Golitschek* (2nd Cir. 1986) 808 F.2d 195, 203 [error
 14 to instruct that ignorance of law no excuse when knowledge of a requirement is an element of the
 15 offense]. The following facts support this claim:

16 51. Petitioner hereby incorporates by reference paragraphs 1 to 49 of this petition.

17 52. The trial court instructed the jury in CALJIC 1.20 that “[t]he word ‘wilfully’ does not
 18 require any intent to violate the law or to injury [sic] another or to acquire any advantage.” The
 19 court then gave CALJIC 3.30, which stated: “General criminal intent does not require an intent to
 20 violate the law. When a person intentionally does that which the law declares to be a crime, he is
 21 acting with general criminal intent, even though he may not know that his act or conduct is
 22 unlawful.” The trial court subsequently also instructed the jury that it must find that “the
 23 defendant had actual knowledge of his duty to register,” and that “having that knowledge,
 24 defendant wilfully failed to register” within 14 days.

25 53. The trial court gave contradictory instructions when it instructed the jury both that it
 26 need find that petitioner violated the law, which was incorrect, and that it must find he had actual
 27 knowledge of his duty to register, which was correct. Moreover, it provided the jury with no
 28

1 guidelines for resolving the contradiction. “[L]anguage that merely contradicts and does not
2 explain a constitutionally infirm instruction will not suffice to absolve the infirmity” because the
3 “reviewing court has no way of knowing which of the two irreconcilable instructions the jurors
4 applied in reaching their verdict.” *Francis v. Franklin*, 471 U.S. 307, 322 (1985). This is true in
5 petitioner’s case where it is impossible to tell whether the jury followed the incorrect or correct
6 instruction.

7 54. If the jury followed CALJIC 1.20 and CALJIC 3.30 and did not find that he had
8 actual knowledge of the registration requirements, the prosecution obtained a conviction based
9 on evidence that did not rise to the level of proof beyond a reasonable doubt of every element of
10 the offense as required by the Fifth, Sixth, and Fourteenth Amendments of the United States
11 Constitution

12 55. Under the facts of this case, petitioner suffered reversible prejudice as a result of the
13 misinstruction because the error cannot have been harmless beyond a reasonable doubt.
14 *Chapman v. California*, 386 U.S. 18, 24 (1967). There was strong evidence, consisting of
15 petitioner’s mental retardation, his memory deficiencies, his incapacity to understand the
16 language of the registration notice, and his statements to officer Olson that he did not know he
17 was required to register again, from which the jury could have concluded that petitioner did not
18 have the required mental state because he did not have knowledge of the registration
19 requirements. The giving of CALJIC 1.20 and 3.30 allowed the jury to convict him nonetheless.

20 **CLAIM NO. 4: PETITIONER WAS DEPRIVED OF HIS
21 FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS
22 AND A FAIR TRIAL WHEN THE COURT FAILED TO
23 INSTRUCT THE JURY THAT IT MUST FIND THAT
24 Petitioner KNEW OF THE SPECIFIC REGISTRATION
25 PROVISION WITH WHICH HE FAILED TO COMPLY.**

26 56. The trial court violated Fifth, Sixth, and Fourteenth Amendment rights because,
27 although it told the jury it was required to find that petitioner had actual knowledge of his duty to
28 register, it did not require the jury to find beyond a reasonable doubt that he knew he was

1 required to register within 14 days of moving to a new city, thus allowing the jury to convict
2 petitioner without finding all the elements proven beyond a reasonable doubt. *In re Winship*, 397
3 U.S. 358, 364 (1970); *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998). As
4 petitioner's actual knowledge of the specific registration requirement at issue was the only
5 element in dispute, the error was prejudicial. The following facts support this claim:

6 57. Petitioner hereby incorporates by reference paragraphs 1 to 55 of this petition.

7 58. The court instructed the jury as follows:

8 In order to prove such a crime, each of the following elements must be
9 proved:

10 One, the defendant is a person who, having previously been convicted of a
qualifying felony sex offense, is required to register as a sex offender pursuant to
Penal Code Section 290.

11 And, two, defendant moved into a city in the State of California and
establish [sic] a new residence and domicile.

12 And, three, the defendant had actual knowledge of his duty to register.

13 And, four, having that knowledge, defendant wilfully failed to register
within 14 working days with a law enforcement agency having jurisdiction over
his place of residence or domicile.

14 59. A conviction of violating section 290 requires proof that the defendant had actual
knowledge of the specific registration provision with which he failed to comply. *People v.*
15 *Garcia*, 25 Cal.4th 744, 752; *People v. LeCorno*, 109 Cal.App.4th 1058, 1068 (2003); *People v.*
16 *Edgar*, 104 Cal.App.4th 210, 220 (2002).

17 60. The instruction the court gave allowed the jury to convict petitioner if he knew he was
required to register, even if he did not know of the specific requirement that he register when he
moved into a new city.

18 61. The misinstruction caused petitioner to suffer reversible prejudice because the
evidence in this case supported the conclusion that petitioner knew he was required to register,
but did not know he was required to register within 14 days of moving to a new city. *Chapman*
19 *v. California*, 386 U.S. at 24. When officer Olson asked petitioner why he did not go to the
20 Sunnyvale Department of Public Safety and register since he was living in Sunnyvale, petitioner
21

1 responded: "I didn't know anything about that.... So there's a lot of things I'm just now learning
2 about, you know.... I didn't know that." When Olson asked whether he was saying he did not
3 know he had to register, petitioner stated: "I figured, I figured since I was already registered, you
4 know, I didn't know at that time, that I didn't know nothing about that at the time, you know.... I
5 figured then, that was that, you know."

6 62. Petitioner's statements to Olson also showed that he felt he satisfied registration
7 requirements by registering one time and then staying out of trouble. When officer Olson told
8 petitioner he registered as a transient in 1994 and could do that now, petitioner responded:
9 "Tolden: May I got (*)¹ look man, I, I, well you can even call this number, you now, I been, I just
10 been working." When Olson asked him again why did not register in Sunnyvale, petitioner
11 answered: "At the time I was just trying, you now trying to figure out how to get my life back
12 together, you know.... (*) you know, I was staying, you know at that time, that I was just trying to
13 get myself together...." Throughout the interview he repeated that he was working, paying rent,
14 and staying out of trouble, apparently believing that this would exonerate him. For example,
15 after telling Olson how much he liked having a job and his own place, he said proudly: "My,
16 matter of fact, my manager will tell you, he say, he, we brag, he saying he comes and goes, pays
17 his rent."

18 63. As there was strong evidence that petitioner knew he was required to register in
19 general, but did not know of the specific provision requiring him to re-register in his new
20 domicile within 14 days of moving, an instruction that improperly allowed the jury to convict
21 him without proof that he had knowledge of the precise provision he was accused of violating
22 cannot have been harmless.

23 ///

24 ///

25 ¹The asterisk was used in the transcript to indicate inaudible portions of the interview.

PRAYER FOR RELIEF

Accordingly, petitioner prays for the court to:

1. Grant petitioner leave to conduct such discovery as has been and shall later be requested by petitioner upon a showing of good cause;
2. Hold an evidentiary hearing on petitioner's claims if necessary.
3. Issue a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to have petitioner brought before it to the end that the judgment and sentence of the trial court be vacated;
4. Grant such other relief as may be appropriate and as law and justice require.

DATED: August 6, 2008

VICTORIA H. STAFFORD
Attorney for Petitioner Delano Tolden

1 **VERIFICATION**

2 Victoria H. Stafford states as follows:

3 1. I am an attorney representing Delano Tolden in this habeas corpus action.

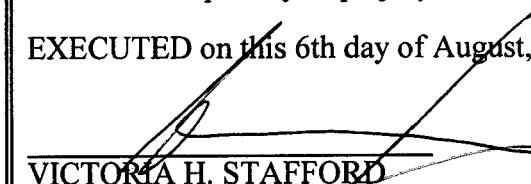
4 2. To avoid unnecessary delay in the filing of this Petition, I am verifying the petition on
Petitioner's behalf.

5 3. Based on my review of the state court record, I know all of the facts described in this Petition
6 and verify them to be true.

7 4. I have conferred with Petitioner Delano Tolden and have discussed with him the claims raised
in this petition. Mr. Tolden has approved the claims raised in this petition and will receive a
8 copy of the Petition.

9 I swear under penalty of perjury that the foregoing is true and correct.

10 EXECUTED on this 6th day of August, 2007 at Oakland, California.

11
12 
VICTORIA H. STAFFORD

PROOF OF SERVICE

2 The undersigned certifies that she is an active member of the State Bar of California, not
3 a party to the within action, that her business address is 6114 La Salle Avenue, No. 161,
Oakland, California 94611, and that she served a copy of the following documents:

4 PETITION FOR WRIT OF HABEAS CORPUS

5 by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said
envelope in the United States Mail at Oakland, California on August 6, 2008 addressed as
6 follows:

7 ATTORNEY GENERAL
455 Golden Gate Ave, Suite 11000
8 San Francisco, CA 94102-3664

9 Delano Tolden
T-51440
10 California State Prison, Solano
P.O. Box 4000
11 Vacaville, CA 95696-4000

12 I declare under penalty of perjury that the foregoing is true and correct and that this
declaration was executed in Oakland, California.

13
14 VICTORIA H. STAFFORD